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IN THE

Supreme Court of the United States

October Term, 1966

No. 1439

OWEN E. JACKSON, GEORGE DITSON JONES, GEORGE H. HOWELL, JR., WINONA L. JACKSON and TRANSCONTINENTAL OIL CO., INC. of NEVADA, now known as TRANSCONTINENTAL POWER COMPANY, a corporation,

Petitioners and Defendants,

vs.

WESTERN GEOTHERMAL, INC., a corporation,

Respondent and Intervenor,

WILLIAM FREE,

Respondent and Plaintiff,

and

HARRY C. LEVY, as Receiver of Transcontinental Power Company, SALTON SEA POWER COMPANY, and HARRY LEVY, as Receiver of Salton Sea Power Company,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

REPLY BRIEF OF PETITIONERS.

(In Reply to Brief of Respondent Western Geothermal, Inc. in Opposition to Petition for Writ of Certiorari).

Petitioners Owen E. Jackson, George Ditson Jones, George H. Howell, Jr., Winona L. Jackson and Transcontinental Oil Co., Inc. of Nevada now known as Transcontinental Power Company, a corporation, referred to herein as Transcon, hereby reply to the brief of respondent Western Geothermal, Inc. in Opposition to Petition for Writ of Certiorari.

Questions Presented.

Respondent (Br. p. 2) misconstrues our questions 1-3 (its Question 1) as involving settlement of a claim against "another", meaning a person not a party to the action. Transcon's "claim" which was settled was against a party on whose petition the receiver was appointed. Thereby, Transcon was deprived of a trial and decision on the merits and the contract was remade. The settlement was effected by assignment of the lease to that party (subject to a carried interest, payment of $50,000.00 and a promise to reassign or pay more) as stated herein in part I of the Argument herein.

Respondent's Question 2 (Petitioners' 4) is broadly stated as "a receiver's" power over extraterritorial real property. If some types of "receivers" can constitutionally have such power, the narrower included question as to the jurisdiction of a temporary receiver to exercise power as herein exercised is an important question.

Respondent says (Br. in Opp. p. 3) Question (3) (c), petitioners' Question 5C, involves the court's failure to continue a hearing not requested to be continued and a hearing on the agreement counsel for Transcon allegedly helped negotiate. The statement of the question presented could be improved by restating it: Were petitioners denied due process of law by the denial of opportunity to be heard and denial of effective aid of counsel?

STATEMENT OF THE CASE.

I.

Respondent's Contention (Br. p. 3) That the Receiver Was Appointed on Free's Petition Fails to Consider Essential Facts.

Respondent sought the appointment of the receiver by its complaint in intervention dated October 1, 1963 and filed October 22, 1963 [Rec. Vol. I, pp. 36-38] and by the affidavit of Chandler Ide, its secretary and vice president (filed on October 8, 1963 as Exhibit A to Free's petition) stating respondent's interest required the appointment of a receiver of Transcon [Rec. Vol. I, pp. 9-12]; the order appointing the receiver recited that it was on respondent Western's complaint in intervention and said affidavit of Chandler Ide as well as Free's petition [Rec. Vol. I, p. 49].

II.

Respondent's Contention (Br. p. 4) That Petitioners' Counsel Negotiated the Agreement and Did Not Object to the Petition to Approve the Settlement Ignores the Essential Facts.

There was no evidence that petitioners' counsel agreed to the settlement as shown by his statement that he would have to give token resistance to the petition to approve or authorize the settlement [Rec. Vol. III, p. 469; Vol. XI, p. 127]. He did not have authority to settle as shown by the fact that petitioners first learned of the settlement in April, 1965 [Aff. of Owen E. Jackson dated 8/24/65, Rec. Vol. III, between pp. 474 and 475].

Regarding failure to object or move for a continuance of the hearing on the petition for authorization,

note that the petition was filed after counsel was hospitalized. On February 10, 1965 the receiver of Transcon and of Salton Sea filed the petition [Rec. Vol. II, p. 353] to which was affixed a proposed settlement agreement and assignment of the lease and in which he requested an order of court for the service of the petition on the parties by mailing the same. It was alleged that the settlement was in the best interest of the two corporations and the proposed agreement and assignment were attached [Rec. Vol. II, pp. 355-373]. No affidavit or other proof of service of the petition was attached to the petition or filed otherwise.

On said February 10, 1965 the court signed and filed the order that notice of "this petition" be served on all parties and that it be served on the defendants "through their attorneys", that objections to the petition be filed no later than ten days after the mailing of said petition to said attorneys "which will be evidenced by affidavits of mailing" [Rec. Vol. II, pp. 374-375]. On February 12, 1965 a notice addressed to the parties and their attorneys was filed but without any affidavit or other evidence of mailing or service [Rec. Vol. II, pp. 376-377]. Although there is evidence that counsel for Transcon knew a petition *would* be filed, there is no evidence by affidavit, testimony, certificate or otherwise of any person to the effect that he personally or otherwise served the petitioners or their attorneys before the hearing, and no evidence that any one had personal knowledge of any service of either the notice of time and place of hearing or the filing of the petition. Counsel's motion for a continuance of the trial and proof of his incapacity was served on February 24th and filed on February 25, 1965 [Rec.

Vol. II, pp. 384-385 and attached pages]. Furthermore, the counterclaims were dismissed *ex parte* [Rec. Vol. III, p. 421].

III.

Respondent's Contentions (Br. pp. 4 and 5) That the Agreement Was for the Best Interest of Transcon, That the Finding to That Effect Is Unchallenged, and That Risk Was Shifted Are Contrary to the Record.

The 1962 agreement between the parties prohibited assignment and contemplated operation by respondent [Rec. Vol. I, pp. 109-111]. After respondent attained, at its expense, capacity to produce 12,500 kw, 40% of the risk would be borne by Transcon. Obviously, the parties believed that on achieving such production financing would be available. That agreement prohibited farmouts and required operation by respondent. The receiver's agreement does not require operation by respondent and provides that upon farmout, respondent retains 80% of the total interest reserved on such farmout. As a practical matter, Western will not operate, will not take the risk, and will not make a substantial investment in the project, it will farmout or assign to others.

Respondent contends (Br. p. 5) that the owner of a working interest "has" to put up his share of the cost in a venture and that Transcon had no money to put up. Petitioners contend that a trial would have resulted in the determination that respondent had not performed its drilling obligations. Respondent represented to the court that drilling had to take place and that the lessor would cause the forfeiture of the lease if drilling did not take place (Pet. for Writ,

pp. 8-9). Yet, paragraphs 4 and 4.3 of the receiver's agreement provided that Western's obligations were conditional upon the lessor's agreeing to such amendments to the lease as it deem necessary [Rec. Vol. II, pp. 358 and 399]. As soon as the receiver made the new contract and assigned the lease to a party litigant, the landlord waived the drilling requirements and no drilling has taken place [Rec. Vol. III, p. 498].

Respondent can now wait and farmout; therefore the respondent is not required to take risk and Transcon is not relieved of any risk; the receiver's agreement reduces Transcon's interest to 50% of what it previously was and eliminates the guarantee of production.

There was no showing that Western had any assets or that its parent company, Natomas Company, would risk its assets on further development. No plan of development was proposed and Western did not demand that Transcon or the receiver of Transcon participate in any development or raise funds therefor. Respondent's position was that Transcon had to be cut down or there would be no more development and the lease would be lost.

The showing of most of these facts in our petition, pages 7-9, does challenge the court's finding that the settlement was in the best interest of Transcon's stockholders.

ARGUMENT.

I.

Neither a State Court nor a Temporary Receiver Appointed by a State Court on the Application of Parties to Litigation Can Constitutionally Remake the Contract Between the Parties to That Litigation and, Prior to a Judgment on the Merits, a Court Cannot Constitutionally Delegate to a Receiver the Authority to Settle the Very Litigation in Which He Was Appointed; These Federal Questions of Substance Should Be Determined by the Supreme Court of the United States.

Respondent attempts (Br. p. 2) to restate petitioners' first three questions presented (Petition, p. 2) and modify them to indicate that the question is, can the receiver negotiate the settlement of a claim asserted against "another", apparently meaning persons other than parties to the lawsuit. Respondent contends (Br. pp. 3 and 7) that the trial court granted Free's petition for a receiver.

The appointment was on respondent Western's petition too as shown herein in part I of the Statement of the Case. The receiver negotiated with a party on whose petition he was appointed.

Respondent again urges that we do not attack the finding of the fairness (Br. p. 6). We do; see part III of the Statement above.

Where the receiver deals with a party other than the party to the litigation, he is of course, not attempting to settle the very litigation in which he was appointed. Our contention is that where there is a dispute over the meaning, performance or breach of a contract or

joint venture agreement, parties to that agreement and litigation cannot procure the appointment of a receiver, and have him change the contract, and thereby deny the parties the right to a trial on the merits of the case. Neither a court nor a receiver *pendente lite* should take one party's property to give relief or rights to other litigants (except as the law provides for performance or damages).

None of the cases cited by respondent indicate that a receiver can be appointed and decide the issues in the very litigation in which he is appointed. As a matter of fact, *Commonwealth of Pennsylvania v. Williams*, 294 U.S. 176, 183 involved a petition filed in the federal district court for the appointment of a receiver and for liquidation of the corporation; the Supreme Court of the United States stated of the procedure in the state of domicile that there was no contention

> ". . . that the procedure thus provided is inadequate, or that it will not be diligently and honestly followed. In such circumstances, the discretion of the District Court invoked by the . . . Commonwealth, should have been exercised to relinquish jurisdiction in favor of the State Court jurisdiction."

That case, *Harkin v. Brundidge*, 276 U.S. 36, and *Superior Oil Corp. v. Matlock*, 47 F. 2d 993 merely hold that of two courts with concurrent jurisdiction, the first to obtain jurisdiction is entitled to retain jurisdiction. It did not involve the issues herein where the question is the nature and extent of jurisdiction

which does not deny due process, not the exercise of concurrent jurisdiction.

Respondent contended it had met its requirement to drill under the 1962 agreement and petitioners contended respondent was in default. This issue should have been tried. Respondent said that drilling must be resumed or the lease would be lost, it thereby procured the receiver's agreement which exonerated respondent's drilling obligations in the 1962 agreement and permitted Western to escape its obligations in the agreement with the receiver unless the lease be amended as respondent deemed necessary; respondent then got the lessor to waive obligations of drilling and production.

If the agreement is a decision, it was premature and is unsupported and unjustified by the record; there should have been a trial on the merits to determine petitioners' contention that Western had not earned its position and petitioners made a substantial investment in operations and remedial work on a non-commercial experimental well.

These wrongs are even more a taking of property without due process of law and are federal questions of substance in view of the incapacity of petitioners' counsel and lack of notice of filing and of time for hearing of the petition for approval of the settlement discussed in part V of this argument below and the facts stated in part II of the Statement of the Case, to which reference is hereby made.

II.

A Temporary Receiver Appointed in an Action in One State Cannot Convey or Alter Title to Land in Another State Without Ancillary Appointment or Order in the State Where the Land Is Situated and This Important Question Should Be Determined by the United States Supreme Court.

Of the question of the Nevada receiver's dealing with the California real property, respondent argues that the statutory corporate receiver succeeds to all powers of the corporation; that ancillary administrations are "unnecessary" and "not customary" (Br. p. 8) and that the California cases cited by petitioners are distinguishable in that the receivers were equity or chancery receivers and not statutory receivers (Br. p. 9). Some types of statutory receivers may have powers that some chancery receivers do not have. The difference between case developed law and statutory law does not affect constitutional jurisdictional matters involved in this case. An analysis of the authorities cited by respondent indicates that what is sometimes referred to therein as a "statutory receiver" is the assignee and successor to the rights of a dissolved corporation. Statutes provide that certain types of corporations, particularly, savings and loan associations, banks, insurance companies and money corporations may be terminated by a state authority; then, of course, the rights of the corporation are succeeded to by someone. He may be named a receiver. Such cases have nothing to do with the situation before this court. That reference is frequently to "statutory" receivers' having more power than equity receivers have requires that the law

be clarified by this Honorable Court's granting a writ herein.

For the alleged rule that ancillary administrations in foreign states are unnecessary and are not customary, respondent cite 17 Fletcher, Corporations, §8562 (p. 871). That section in turn refers to 16 Fletcher, p. 19, §7666, where it is said of a business covering two or more states ". . . it is customary to appoint ancillary receivers in the other jurisdictions".

Respondent also cites *Relf v. Rundle,* 103 U.S. 222, 26 L. Ed. 337. In that case, on his petition in Missouri, Relf was appointed receiver of the Life Association of America, a Missouri corporation. Rundle filed a petition in Louisiana for a receiver to take possession of the assets in Louisiana. In Missouri, the corporation was dissolved, Relf succeeded to its assets, appeared in the Louisiana proceeding, moved its transfer to the federal court, and the federal trial court remanded the cause to the state court. The United States Supreme Court reversed the order of remand stating that the corporation no longer existed and Relf, as "trustee", became its successor. Obviously, after the liquidation of a corporation pursuant to a decree on the merits of the lawsuit, the successor has standing to deal with out of state real property. That case is distinguishable from the case now before the court because: it did not involve a temporary receiver; it did not involve an existing corporation; and it did not involve a settlement by a receiver between the parties to a lawsuit altering their contract and making moot the trial of the action without a trial on the merits.

Converse v. Hamilton, 224 U.S. 243, 56 L. Ed. 749, 32 S. Ct. 415, cited by respondent, reversed a judg-

ment of dismissal after the sustaining of a demurrer to a complaint by a receiver to recover shareholders' double liability. It was held that plaintiff was not an ordinary receiver (p. 257) and that he was an assignee and representative of the creditors (pp. 256, 257) and held their title.

Respondent also cites *Clark v. Williard*, 292 U.S. 112, 78 L. Ed. 1160, 54 S. Ct. 615. While the Supreme Court of the United States reversed the state court, it did not require the state court to recognize the act of the receiver appointed in another state. Although there is uncertainty as to when ancillary receivers are required, *Clark v. Willard* does not indicate that ancillary administrations in the state where property is located are unnecessary; the rule is stated in the decision of the United States Supreme Court on certiorari after decision of the state court following the reversal; that second opinion is reported in 294 U.S. 211, 79 L. Ed. 865, 55 S. Ct. 356. There, the holding of the state court that it could ignore the receiver's acts was affirmed.

The Supreme Court said of its prior decision:

> "we held that under the statutes of Iowa, the liquidator was the successor to the corporation, and not a mere custodian. . . . The question was then an open one whether there was any local policy, expressed in statute or decision, whereby the title of a statutory successor was to be subordinated to later executions at the suit of local creditors" (p. 212).

It also said:

> "Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under a process of its court . . . .
>
> ". . . claimants in Montana might pursue their suits and remedies in derogation of the assignment when the law or policy of the locality ordained that this result should follow" (pp. 213, 214).

Respondent cites *Nunn v. Feltinton*, 294 F. 2d 450. There a bank was dissolved and the receiver was the successor to and only party with standing to deal with its property. That case did not involve the remaking of contracts between the parties.

A successor to the assets of a corporation such as referred to in the foregoing cases is not an officer of the court, does not derive his power from the court and is not acting in aid of the jurisdiction of the court. See *Caminetti v. Guarantee Union Life Ins. Co.*, 22 Cal.2d 759, 763 and 764, 141 P. 2d 423.

As ably pointed out by Justice Stone in his dissent in *United States v. Pink*, 315 U.S. 203, 246, 86 L. Ed. 796, 62 S. Ct. 552, a state may refuse to give full faith and credit to transfers by out of state courts and officers of property in its jurisdiction; he cites the following:

> *Green v. Van Buskirk*, 5 Wall. 307, 311-312;
>
> *Hervey v. Rhode Isle Loc. Works*, 93 U.S. 664;

Security Trust Co. v. Dodd M. & Co.; 173 U.S. 624;

Clark v. Williard, 292 U.S. 112, 122 and 294 U.S. 211.

That the eminent counsel representing respondent cannot find a case holding that courts and receivers *pendente lite* can do the acts herein complained of, and that counsel confuse rules on successors upon dissolution of corporations with the rules on mere temporary receivers (before trial and decision on the merits) demonstrates the need for a clarification of the law on these important jurisdictional federal questions of substance.

California wisely protects property rights by requiring the posting and publishing of notices of sales by receivers (§§568.5 and 692, Calif. Code Civ. Proc.). Nevada law can not alter these rules.

Respondent claims (Br. p. 9) that a court can order parties to transfer out of state property. Such is done only to protect or give effect to a right to the property and then only after a trial and decision on the merits. In this case the receiver was a temporary receiver *pendente lite*, the cause was not decided on the rights of the parties, and Western had no right to the lease. Such transfer to respondent deprived Transcon of its property without due process of law.

The Federal questions of substance argued in this part II were not determined by this Honorable Court prior to the Nevada decision (or at all) and are not decided by the state court in accord with applicable decisions of this Honorable Court.

III.

The Nevada Court Denied Transcontinental Power Company Due Process of Law by Excluding It as an Appellant on the Ground That, Although Named as an Appellant in the Original Notice of Appeal, It Was Omitted From an Amended Notice of Appeal.

Respondent refers to this point as the court's not according the status of an appellant to a party not named as appellant (Resp. Br. in Opp. pp. 9-10). Actually, Transcon was named as an appellant in the Notice of Appeal lodged with the clerk, within the time permitted, the required bond and filing fee were paid to the clerk. The problem arises because counsel filed an amended notice of appeal which omitted the name of Transcon. Can counsel by amendment of a notice of appeal unintentionally and without authority leave out an appellant who is otherwise timely and properly an appellant?

We repeat our argument to the Nevada Supreme Court [Rec. Vol. XII, p. 114]. Where notices of appeal stated that the defendant appealed, it was held that plaintiff had properly taken an appeal in *Wolff v. Hubert,* 192 N.Y.S. 801, and in *Poggetto v. Bowen,* 18 Cal. App. 2d 173, 63 P. 2d 857. A notice incorrectly naming "C.A. Burton" as an appellant was held to constitute an appeal by defendant "Geo. W. Blackburn" in *Chung Sing v. Southern Pacific Co.,* 178 Cal. 261, 172 Pac. 1103. See also *Kitchenmaster v. Mutual Auto Ins.* (Wisc.), 21 N.W. 2d 727.

As said in 4A C.J.S., Appeal and Error, Sec. 593 (8), page 345:

> "Mere clerical errors or surplusage, however, or other defects which do not mislead, will not be fatal, but the notice will be sufficient in this respect if the court, cause and parties are sufficiently stated to give appellee full notice of the cause appealed".

In this case the original Notice of Appeal was served on the parties; the amended notice of appeal was not [Rec. Vol. XII, pp. 7-13, 97 and 117 (Appendix to p. 116); Vol. III, pp. 588-590].

Transcon's assets were held or clouded by the receiver. It had the clearest right of any appellant to have Vol. XI of the record filed late.

IV.

Refusal to File Part of the Record Was Denial of Due Process of Law.

Respondent missed the real question presented in petitioners' brief on this point; as stated in our statement of the facts, the temporary receiver appointed by the court and acting as an arm of the court held the assets of Transcon and deprived Transcon of part of the record on appeal by withholding the funds of Transcon. It was the court's own officer who had the duty to provide the record.

Respondent says (Br. p. 10) that the corporation could have appeared *in forma pauperis*. Respondent cites no rule indicating that a corporation could act *in forma pauperis*. In any event, when individuals came up with money for the remaining part of the record

desired and no one was prejudiced by late receipt of that part of the record, the Nevada Supreme Court should have accepted that part of the record [Rep. Tr. of Dec. 1965 hearing, Vol. XI].

Said Vol. XI would have been helpful as follows:

Notice of default was served by lessor, page 125. The receiver believed that the lease would have been lost if a well were not drilled soon, pages 106-108.

The receiver would have done differently if he had known no well need be drilled; pages 109-110.

Receiver made no demand that Western drill, pages 121-123.

The receiver could not or did not attempt to deal with other persons; It held only Transcon's interest (subject to Western's interest) in the lease.

The attorney for the receiver knew petitioners' attorney had no authority to settle and would object, page 127.

V.

Petitioners Were Denied Due Process of Law by the Denial of Opportunity to Be Heard With Effective Aid of Counsel; This Raises a Question Which Should Be Decided by the Supreme Court of the United States.

Respondent says (Br. p. 11) of petitioners' question 5C [respondent's (3)(c)] that our complaint is that the court failed to grant a continuance for a hearing as to which there was no motion for continuance. It is true that there was evidence that counsel for petitioners did attend some negotiations. It was not a nego-

tiated settlement and it was not agreed to; it was ordered by the court. If petitioners' counsel thought the settlement was the best that could be done, such does not have any bearing on the issues before the court. He didn't have the authority to make the settlement and did not purport to agree to it. Furthermore, his belief that it was the best that could be done arose from the erroneous belief induced by the representations of Western that the lease would be lost if additional wells were not drilled. No drilling has taken place since the receiver's agreement was made and the lease has not been lost. The lessor waived the drilling requirement [Rec. Vol. III, p. 498].

When the foregoing was discovered by petitioners, the receiver had Transcon's assets so that it could not employ counsel and other petitioners could not obtain funds on the strength of its stock then held. Its then counsel was relieved on his motion stating he had not been paid costs.

An owner of property and his successor on liquidation can settle a lawsuit without court approval. However, a temporary receiver, *i.e.*, a *pendente lite* receiver, is in a different position.

The receiver, an arm of the court, knew that the corporate owner would object to the settlement [Rec. Vol. III, p. 469; Vol. XI, p. 127], its attorney was going to talk to his clients [Rec. Vol. XI, p. 127], and was led to expect that the matter would be heard by the court on a petition for approval; the receiver and the court knew of the accident and inability of the attorney to appear even if given notice [Rec. Vol. II, pp. 384 to 385 and Ex. A thereto]; the temporary receiver could have

mailed notice to the parties. Due process required notice of time and place of hearing and an opportunity to be heard. Where a court takes a party's assets *pendente lite,* due process requires it to see that the party has effective aid of Counsel (to the extent such assets may provide) in that action. This question is a federal question of substance, not previously determined by, or has been decided in a way not in accord with applicable decisions of, this Honorable Court.

Conclusion.

Without citing the record, respondent contends that it has work to be done. The record contradicts this contention as stated in part III of the Statement of the Case herein.[1]

We think that each of the jurisdictional questions are federal questions of substance not heretofore determined by this court and are decided in a way not in accord with applicable decisions of this court. The combination of procedural wrongs and jurisdictional questions make the acts herein complained of a flagrant taking of property (contract rights) without due process of law by remaking the contract between the parties and is an unconscionable wrong; if the decision stands, many venturers and partners can be expected to lose part of their interest to the partner who agrees to provide the capital, claims that it is desirable for the safety

[1]If respondent speaks of its present intention and status, which is outside the record, is it fair for us to point out that it has sublet or farmed out to Chloride Products, Inc., which has been recovering minerals for about 18 months and that no other activity is planned? Western's lack of a plan was the source of the differences which lead to the claims of default and forfeiture in 1963.

of their common property that it have a larger share and, even though others have performed their part of the bargain and are not liable in damages or otherwise, obtain part of the other's rights without a trial on the merits of any dispute and without support of any rule of law providing for such realignment of rights.

Respectfully submitted,

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